



220399

October 4, 2007

**VIA E-FILING**

Honorable Vernon A. Williams  
Secretary  
Surface Transportation Board  
395 E Street, S.W.  
Washington, DC 20423

RE Finance Docket No. 32760 - Union Pacific Corporation, et al., --  
Control and Merger -- Southern Pacific Railroad Corporation, et al.,

Dear Secretary Williams:

Enclosed for filing in the above-captioned proceeding are an unredacted version ("Highly Confidential Version") and a redacted version ("Public Version") of the Reply Brief of Union Pacific Railroad Company (UP/SP 407) in the above-referenced proceeding. The Highly Confidential Version contains information produced by Union Pacific Railroad Company or by BNSF Railway Company in discovery designated by it as "Highly Confidential." That version is filed under seal and should thus not be made available to the public. The Public Version redacts the information designated as "Highly Confidential" and therefore may be made available to the public.

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "W.G. Barr".

WGB/mls  
Enclosures

cc All Parties of Record

William G. Barr  
Assistant General Solicitor

UNION PACIFIC RAILROAD  
1400 Douglas St., Stop 1580, Omaha, NE 68179-1580  
ph (402) 544-5334 fx (402) 501-0127  
wgbarre@up.com

PUBLIC VERSION

UP/SP 407

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**Finance Docket No 32760**

**UNION PACIFIC CORPORATION, UNION PACIFIC RAILROAD COMPANY  
AND MISSOURI PACIFIC RAILROAD COMPANY  
– CONTROL AND MERGER –  
SOUTHERN PACIFIC RAIL CORPORATION, SOUTHERN PACIFIC  
TRANSPORTATION COMPANY, ST LOUIS SOUTHWESTERN RAILWAY  
COMPANY, SPCSL, CORP AND THE DENVER AND  
RIO GRANDE WESTERN RAILROAD COMPANY**

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**REPLY BRIEF OF  
UNION PACIFIC RAILROAD COMPANY**

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**J Michael Hemmer  
Lawrence E Wzorek  
William G Barr  
Jeffrey S Asay  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179  
Tel (402) 544-5000**

***Attorneys for Union Pacific  
Railroad Company***

**October 4, 2007**

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**EXHIBIT B -- Cited Documents Produced by BNSF or UP in Discovery (in order referenced in Reply Brief)**

**BEFORE THE  
SURFACE TRANSPORTATION BOARD**

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**REPLY BRIEF OF UNION PACIFIC RAILROAD COMPANY**

Pursuant to the procedural schedule adopted by the Surface Transportation Board in its Decision dated May 4, 2007 (served May 7, 2007), in this proceeding, UP submits this Reply Brief responding to the August 20, 2007 Opening Brief of BNSF Railway Company Opposing UP's Petition for Reformation of Agreement ("Petition")<sup>1</sup> UP's Reply Brief is supported by the Verified Statement of Stephen R. Barkley, UP's Vice President Harriman Dispatching Center & Network Operations (Barkley VS), the Verified Statement of John H. Rebensdorf, Vice President Network Planning & Operations for UP (Rebensdorf VS), and the Verified Statement of Jack R. Argyle, Director Train Management for UP (Argyle VS). Mr. Barkley is responsible for and oversees the operation of UP's Harriman Dispatching Center, including the dispatching

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<sup>1</sup> Any capitalized term not defined in this Reply Brief has the meaning given it in the Petition or UP's Initial Brief in this proceeding dated August 20, 2007 as applicable.

of trains over the UP rail lines at issue in this proceeding Mr Rebensdorf participated in and was UP's principal business negotiator in the negotiations with BNSF for the Original Settlement Agreement, the Restated and Amended BNSF Settlement Agreement, and a March 3, 2004 Memorandum of Agreement with BNSF providing it with trackage rights between Bakersfield, California, and Stockton, California Mr Argyle is responsible for and oversees daily train operations on UP's Western Region North territory, which includes portions of UP's Utah and Roseville Service Units

### **INTRODUCTION**

UP seeks reformation of Section 1(g) of the Restated and Amended Settlement Agreement to conform it with UP's and BNSF's intent to retain certain restrictions on BNSF's use of UP trackage between Stege (Richmond), California, and Sacramento, California, and between Sacramento and Stockton BNSF operates over those lines as a trackage rights tenant The number and type of trains that BNSF is allowed to operate over them is governed by Section 1(g) UP and BNSF mistakenly and inadvertently removed the Central Corridor and I-5 Restrictions in drafting the Restated and Amended Settlement Agreement These Restrictions allowed BNSF to compete with the combined UP/SP only for (a) transcontinental intermodal and automotive traffic moving over the Central Corridor Route and (b) intermodal traffic moving over the "I-5" Route Removal of the Restrictions has opened the Cal-P and Elvas-Stockton Lines to more BNSF trackage rights trains than the parties intended Reformation of Section 1(g) is required to prevent BNSF's trains from continuing to (a) contribute to delays to the 44 passenger trains operating daily over the Cal-P Line between Martinez and Oakland and (b) interfere with UP's ability to compete with BNSF

## **SUMMARY OF BNSF ARGUMENTS**

In its Opening Brief BNSF contends that UP has not adequately established its entitlement to reformation by reason of a mutual mistake of the parties since (a) UP has produced no written "antecedent agreement" to maintain the terms of the original version of Section 1(g) and (b) UP's conduct after the filing of the Restated and Amended Settlement Agreement demonstrates that no such "antecedent agreement" existed. It is BNSF's position that, if a mistake was made in drafting revised Section 1(g), UP is barred by its own "gross negligence" from the reformation remedy. It further contends that Section 1(g) should not be reformed since the volume of trains BNSF currently operates over the Cal-P Line, including the unauthorized non-Central Corridor and non-I-5 Intermodal Trains, is less than the parties anticipated when they entered into the Original Settlement Agreement. BNSF also alleges, without adequate foundation in fact, that UP "is trying to close its lines to BNSF in order to accommodate a high volume of passenger trains" (BNSF Opening Brief, p. 2). Finally, BNSF opposes the requested relief based on the claim that it would harm certain BNSF shippers.

In this Reply Brief UP rebuts BNSF's arguments and demonstrates that it is entitled to and should receive the requested reformation relief.

## **LEGAL ARGUMENT**

### **A The Existence of a Mutual Mistake or BNSF's Knowledge of the Mistake When Made**

#### **1 The Law on Contract Reformation**

In its Opening Brief BNSF cites four elements that must be established to justify the remedy of reformation: (a) entry by the parties into an agreement before they drafted the contract, (b) agreement by the parties to put that agreement in writing, (c)

the written agreement failed to accurately express their agreement, and (d) that failure to accurately express their agreement was mutual. See Restatement (Second) Contracts Section 155 cmt. C; 7 Corbin on Contracts, at 283, Cal. Civ. Code Section 3399. The existence of these four elements in the case of the parties' revision of Section 1(g) in 2001 is established by clear and convincing evidence as demonstrated below.<sup>2</sup>

## **2. The Parties' Understanding to Retain the Restrictions**

In its Opening Brief, BNSF devotes much attention to, and places great reliance upon, its contention that UP is not entitled to the requested reformation because the parties did not enter into a written "antecedent agreement" to retain the Central Corridor and I-5 Restrictions in Revised Section 1(g). But any such agreement, even if required, need not be in the form of a separate written document signed by the parties.

It would have been unusual and unnecessary for BNSF and UP to memorialize in a written agreement their understanding to maintain geographic routing restrictions in place since UP and SP merged in 1996. (Indeed, why would parties feel compelled, or even be inclined, to reduce to writing their understanding that a longstanding agreement provision would not be substantively changed in a restatement of the provision not

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<sup>2</sup>As noted by BNSF in Footnote 20 of its Opening Brief, a party may merit relief in a contract mistake case if one of the parties did not in fact make a mistake, yet knew the other party had. Presented later in this Brief is clear and convincing evidence of mutual error in the omission of the Central Corridor and I-5 Restrictions from the version of Section 1(g) incorporated in the Restated and Amended Settlement Agreement. However, if BNSF was not so mistaken, UP is not, as BNSF contends, barred from asserting that BNSF knew of UP's drafting error because UP in its Petition expressed the belief that the omission did not result from "any deliberate effort by BNSF to gain an advantage." UP Petition at p. 20. By that statement UP merely observed that it was unaware of any premeditated "effort" of BNSF, by guile or otherwise, to lure UP into, or entrap it in, the mistake. UP believes that clear and convincing evidence exists that the mistaken omission was mutual. If, however, the Board finds otherwise, UP has not conceded that BNSF did not know of the mistake at the time it was made by UP. UP has only stated its belief that the mistake was not the result of any "deliberate effort" of BNSF. If the mistake was not mutual, BNSF knew of it at the time UP made it and Section 1(g) should be reformed to correct it under the principle incorporated in Cal. Civ. Code Section 3399 as BNSF itself notes.



intended to substantively change it?) Rather, their agreement or understanding to maintain the Restrictions is evidenced in documents they exchanged during the drafting of the Restated and Amended Settlement Agreement That neither party intended to eliminate the I-5 and Central Corridor Restrictions in restating Section 1(g) in the Restated and Amended Settlement Agreement is also reasonably inferred from BNSF's failure to produce any documents or other evidence supporting a contrary interpretation

It is instructive to again review the exchange of drafts of revised Section 1(g) In a December 22, 2000 letter to UP's Lawrence E Wzorek, BNSF proposed to UP a first draft of the Restated and Amended Settlement Agreement along with "a chart showing the principal sections which have been changed and a brief description of the modifications " (See Attachment 1 to Rebensdorf/Wzorek VS included as Exhibit F to UP's Petition ) As explained in UP's Initial Brief, Section 1(g) of this redraft retained the Central Corridor and I-5 Restrictions, rephrasing them only slightly to improve their syntax while making no change in their substance. BNSF included with its letter a chart it had prepared of "principal changes" which it proposed to make to the Settlement Agreement That chart contains no reference to Section 1(g) (Rebensdorf/Wzorek VS, pp 4 and 5, Attachment I) The inescapable conclusion is that BNSF neither intended nor sought to make substantive changes to that section

In response to the revision of Section 1(g) proposed by BNSF which expressly retained the Central Corridor and I-5 Restrictions, UP proposed two versions of Section 1(g) to BNSF one mistakenly and inadvertently omitting the Restrictions through a drafting error, and one retaining the Central Corridor and I-5 Restrictions essentially unchanged from the Original Settlement Agreement, as amended by the Second

Supplement Messrs Rebensdorf and Wzorek, UP's primary representatives in the negotiations, mistakenly considered the two versions offered by UP to be "equivalent and interchangeable" and mistakenly believed that both versions imposed substantively the same Restrictions as Section 1(g) of the Original Settlement Agreement (Rebensdorf/Wzorek VS, pp 6 and 7) As stated by Mr Rebensdorf and Mr Wzorek in reference to the Restated and Amended Settlement Agreement negotiations, "[n]o change in or elimination of the Central Corridor Restriction and/or the I-5 Restriction was discussed between the parties during those negotiations " (Rebensdorf/Wzorek VS, p 7)

In Footnote 7 of its Opening Brief, BNSF argues that it "reasonably understood that [the two alternatives proposed by UP] accurately reflected UP's considered intent to offer two separate and distinct inserts, " BNSF has offered no explanation why it would be reasonable for it to assume such intent by UP when BNSF had made no request of UP for removal of the Restrictions The more reasonable assumption would have been that UP had mistakenly omitted the Restrictions, particularly since UP, in the material transmitting the two alternatives to BNSF, expressly characterized the defective Section 1(g) alternative merely as the "Alternative Section 1(g) which uses less of the existing language " (BNSF-00339) The only reasonable inference that could be drawn from that statement is that UP intended the two alternatives to be substantive equivalents

Furthermore, on July 25, 2001, BNSF and UP jointly submitted to the Board a draft of the Restated and Amended Settlement Agreement that included the version of Section 1(g) also contained in the final they jointly filed with the Board on March 1,

2002 This filing also included a chart of "Principal Amendments to BNSF Settlement Agreement" (in addition to those made by the First and Second Supplements) That chart, which appears as Exhibit A to this Brief, states that the proposed Restated and Amended Settlement Agreement "restates," rather than "changes," the Section 1(g) traffic restrictions on the Cal-P and Donner Pass lines

Taken together, these documents demonstrate two important points First, that the parties understood and agreed that the restatement of Section 1(g) was not to effect substantive change, and certainly no change of the magnitude resulting from the elimination of the important Restrictions, and, second, that the parties mistakenly omitted the Restrictions from the version of Section 1(g) incorporated in the Restated and Amended Settlement Agreement

The Board should take careful note of the fact that BNSF has produced no document or any other evidence indicating that it requested, or even considered asking for, elimination or modification of the I-5 and Central Corridor Restrictions Based on BNSF's arguments, one would expect at least some evidence that BNSF sought the elimination of these Restrictions as part of any overall "give and take" discussion of multiple open issues during the negotiations for the Restated and Amended Settlement Agreement There is no such evidence for the simple reason that no "horse trading" took place during the negotiations over Section 1(g) BNSF never asked for this concession as part of an overall strategy, and UP wanted only to simplify the manner in which the Restrictions were expressed The evidence, including BNSF's failure to produce any writings on the issue, supports UP's belief that BNSF also mistakenly

considered the two alternative versions to have the same operational restrictions, at least until later events handed BNSF an opportunity to take advantage of the mistake

### **3     The Language of Revised Section 1(g)**

BNSF's argument that the language of Revised Section 1(g) itself refutes any claim that the parties had effectively agreed to maintain the Restrictions intact without change is specious, and is at best circular. Revised Section 1(g) is both unambiguous and incorrect. Clarity does not in this instance equal correctness. This proceeding has been brought to correct the mistake made by the incorporation of the defective Section 1(g) alternative. The Revised Section 1(g) language simply reflects the mistaken omission of the Restrictions when the parties drafted and included it in the Restated and Amended Settlement Agreement.

### **4     UP's Course of Performance**

BNSF contends that UP's course of performance under the Restated and Amended Settlement Agreement is evidence that the parties did not intend to retain the Central Corridor and I-5 Restrictions. In support BNSF quotes selectively from certain UP-internal memoranda and correspondence with BNSF. These quotes, which are largely taken out of context, are statements and misconceptions of UP employees who, regretfully but understandably, were unfamiliar with the Restrictions and the extent and nature of BNSF's trackage rights over the Cal-P and Elvas-Stockton Lines. UP did permit the operation of unauthorized BNSF Intermodal Trains over the Cal-P Line and could have moved earlier to prevent further movements. But once the operation of those trains came to the attention of UP officers whose job it is to know BNSF's rights under the Original Settlement Agreement, the Restrictions, and the parties' intent to

retain the Restrictions in the Restated and Amended Settlement Agreement, UP moved decisively to put BNSF on notice of the problem (See UPR-07-0008125, an email from Mr. Rebensdorf to BNSF's Rollin Bredenberg )

Much of BNSF's argument in support of its position is made by Mr. Peter J. Rickershauser in his Verified Statement attached to BNSF's Opening Brief. However, Mr. Rickershauser's credibility is impaired by certain misstatements made in that Verified Statement. At page 5 of its Opening Brief, BNSF states that Mr. Rickershauser's Verified Statement describes how, in BNSF's view, "Original Section 1(g) contained ambiguous language concerning the extent to which trains using the Cal-P Line and the former SP Elvas-Stockton line had to have a prior or subsequent movement over the Central Corridor or the I-5 Corridor." Yet that is not and could not be the case because BNSF did not receive the right to operate over UP's Elvas-Stockton Line in the Original Settlement Agreement. It received operating rights over the Elvas-Stockton Line in 1996, only when it was determined that a connection could not be built by BNSF at Haggin, California, to connect the rights BNSF received on UP's Martinez and Sacramento Subdivisions to connect Denver with Stockton through the Central Corridor via Donner Pass. UP then granted BNSF rights on its Fresno Subdivision between Elvas and Stockton, but only for Central Corridor trains with a prior or subsequent movement over Donner Pass. (Rebensdorf VS, p. 3)

Mr. Rickershauser refers to a March 3, 2004 Memorandum of Agreement (the "MOU") between it and UP (and a subsequent trackage rights agreement implementing the MOU) providing, among other things, BNSF with trackage rights between Bakersfield and Stockton. He states that BNSF negotiated the MOU with the

understanding that BNSF had the right to use the Cal-P Line into Oakland for intermodal trains (Rickershauser VS, pp 8 and 9 ) However, Mr Rickershauser did not participate in the negotiations with UP for the MOU, nor was any such "understanding" ever communicated to UP UP could not know BNSF's real "understanding" of its Cal-P Line rights without being advised of it by BNSF No such advice was ever given

The MOU negotiations between BNSF and UP were conducted exclusively by Mr Rebensdorf, on behalf of UP, and Rollin D Bredenberg, BNSF's Vice President – Service Design and Performance At no time during those negotiations did Mr Bredenberg state, or even imply, that BNSF sought the rights between Bakersfield and Stockton for use in the operation of trains that would also move over the Cal-P Line. In fact, their discussions focused on I-5 Corridor trains which were operating down to Stockton from Keddie over trackage rights granted by UP to BNSF in the UP/SP merger If UP had been advised during the negotiations of Mr Rickershauser's "understanding" of BNSF's Cal-P Line rights and BNSF's intended use of the Stockton-Bakersfield trackage rights to access the Oakland Intermodal Gateway ("OIG") via the Cal-P Line, Mr Rebensdorf would never have agreed to grant BNSF operating rights between Stockton and Bakersfield (Rebensdorf VS, p 4 )

##### **5 BNSF's "Notice" to UP**

BNSF alleges that it gave UP prior notice of its intended operation of non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P Line Specifically, BNSF states that (1) it provided UP with an "operating plan" for those trains (Barrett VS, p 4), (2) its trackage rights officials in Omaha regularly "spoke" with their counterparts at UP's Harriman Dispatching Center ("HDC") about the trains' operation, (3) all of these trains

were "electronically entered" (in a format identifying type, origin, and destination) in UP's computer system, and (4) certain correspondence between BNSF and UP gave UP notice of the trains' operation and is evidence of their acceptance by UP (Barrett VS, p 5) However, the weakness of each of these arguments is revealed under close examination

a     The Lack of an Operating Plan   UP is aware of no operating plan provided to it by BNSF relating to the operation of non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P Line (Barkley VS, p 2) At pages 11 and 29 of its Opening Brief BNSF refers to a "notice" given by Bruce Barrett, BNSF Manager, Trackage Rights Operations, to UP's corridor managers, directors, and dispatchers *advising them of BNSF's intent to operate OIG tains to and from Stockton over the Cal-P Line and the Elvas-Stockton line* However, BNSF has not provided UP with a copy of any such notice nor has UP located one in its files Most likely, BNSF is referring to a November 4, 2004 letter from Mr Barrett to UP's HDC addressing trackage rights it received between Stockton and Bakersfield under the MOU and implementing trackage rights agreement (BNSF-01563 ) That letter, however, neither mentions nor bears upon the operation of trains over the Cal-P Line

b     The Conversations at HDC   BNSF places much emphasis on notice of the trains' operation purportedly given to UP's Corridor Managers However, as Mr Barkley explains in his Venfied Statement, UP's Corridor Managers are not required to know the extent of BNSF's trackage rights over UP and any limitations or restrictions on those rights (Barkley VS, pp 3 and 4 ) It is simply not realistic to expect

UP's dispatchers to be familiar either with the extent and nature of BNSF's rights or the origin and destination of BNSF's trains to enforce the Restrictions

In the Restated and Amended Settlement Agreement, UP granted BNSF trackage rights over more than 4,500 miles of UP track. These grants were subsequently implemented by eleven individually tailored trackage rights agreements. BNSF also operates over approximately 3,000 miles of additional UP trackage under other trackage rights agreements. Many of these trackage rights agreements, whether or not they implement the Settlement Agreement, contain specific, and often complex, provisions establishing the nature and extent of the rights and any applicable limitations and restrictions (Rebensdorf VS, p 2 ). Finally, BNSF is also permitted to temporarily operate over certain UP trackage under detour arrangements with UP that are common in the railroad industry. UP's Corridor Managers cannot be expected to be familiar with all of these agreements and their corresponding rights and restrictions (Rebensdorf VS, pp 2 and 3, Barkley VS, p 3 )

Finally, UP's Corridor Managers are unfamiliar with BNSF's train symbols and cannot tell from them a train's origin and destination and whether it is permitted to operate as proposed by BNSF under the applicable agreement. They rely instead on the electronic interface described below to determine if a train's operation is permitted (Barkley VS, p 4 )

c     Electronic "Acceptance" of Trains. BNSF notes that some 1,000 non-Central Corridor/non-I-5 Intermodal Trains have operated over the Cal-P Line. It argues that the operation of those trains, including UP's billing of BNSF for their operation, demonstrates that they were "accepted" by UP. As described at pages 4



through 6 of Mr Barkley's Verified Statement, the electronic entry of non-Central Corridor and non-I-5 Intermodal Trains in UP's computer system is not evidence that UP knew their operation was an unauthorized use of the Cal-P Line. Accordingly, UP did not knowingly accept those trains and should not be deemed to have accepted them.

BNSF's Opening Brief at page 27 describes the programming of the "Master DB5," or so-called "dummy," for certain routes, including, in this case, non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P and Elvas-Stockton Lines. BNSF assumes, incorrectly, that such "dummies" would have been prepared exclusively and solely for the "regular" operation of Intermodal Trains. However, "dummies" are often prepared for "irregular" operations, including, most often, detour train operations. Doing so permits such operations on short notice and promotes operating convenience and efficiency.

It is true that Master DB5s/"dummies" were prepared for the operation of non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P and Elvas-Stockton Lines. However, their preparation is not evidence of any acceptance by UP of any right of BNSF to operate such trains without restriction. Their use is also not evidence that UP knew of and accepted the operation of non-Central Corridor and non-I-5 BNSF Intermodal Trains over the Cal-P Line since 2004. As described by Mr Barkley in his Verified Statement, the creation of the "dummies" can be explained in one of several ways, none of which is evidence that UP agreed to accept non-Central Corridor and non-I-5 Intermodal Trains. Either the "dummy" was prepared and established for a permissible temporary operation like the movement of detour trains or the UP employee

who programmed the Master DB5 was, for the reasons described above, unaware of the Restrictions

The fact that unauthorized BNSF Intermodal Trains were permitted to run over the Cal-P Line is not an admission by UP that it accepted or approved their operation. With the establishment of the electronic interface, no individual review of the operation of trains following the programmed routing is undertaken. Once the route was programmed with the "dummy," all trains with program-permitted origins and destinations, whether or not they are in fact detour trains, are permitted by the program to operate. The actual operations and the nature of the trains actually operating are not reexamined. The proffered trains are automatically either accepted or rejected for operation. With the DB5/"dummy" already in place, the non-Central Corridor and non-I-5 Intermodal Trains offered by BNSF for movement were automatically accepted for movement.

The operation of the non-Central Corridor and non-I-5 Intermodal Trains was not questioned by the electronic interface once it was established either to accommodate legitimate temporary operations like detour trains or through inadvertent error. Accordingly, though UP's computer system may have understood the information it received on those Intermodal Trains operating contrary to the Restrictions, its failure to reject those trains is not evidence that UP ever conceded the legitimacy of their operation, except in the rare case of temporary detours.

d      Correspondence Between BNSF and UP BNSF cites certain correspondence between UP and BNSF in claiming that UP has for some time known of and accepted the operation of non-Central Corridor and non-I-5 Corridor Intermodal

**Trains over the Cal-P Line** In doing so, BNSF places far too much reliance on that correspondence, which is largely taken out of context BNSF also neglects to mention a revealing email request made by it in late 2004 (and produced by UP in discovery) to operate temporary trackage rights trains between Bakersfield and Stege (Richmond) to facilitate maintenance-of-way repairs on its own line (UPR-07-0008777 ) Of course, BNSF would have no need to make that request if it believed it already had trackage rights over the Cal-P Line for those trains (which would have been Southern Transcon trains)

At page 11 of its Opening Brief, BNSF recounts an exchange of correspondence between it and UP relating to UP's prohibition of three non-Central Corridor and non-I-5 intermodal trains from the Cal-P Line in early 2005 In a February 3, 2005 email, Chris Roberts, BNSF's Region Vice President – South Operations, complained to UP's Tom Jacobi about UP's refusal to allow the operation of these trains (UPR-07-0001657) UP responded in an email from Mr Barkley of the same date (UPR-07-0001656) BNSF notes that Mr Barkley's response advised that BNSF's use of the trackage rights "should get back to normal through today and into tomorrow" and that he would "communicate within the dispatching center and with Western Region management regarding some miscommunication and misunderstanding of BNSF Trackage Rights in California recently "

However, BNSF's reliance on Mr Barkley's email is misplaced because the language it quotes is taken out of context Mr Robert's email addressed two issues the operation of BNSF trains between Stockton and Oakland, and BNSF trackage rights trains operating northbound on UP's Canyon Subdivision (which is a part of UP's

Feather River Route) Mr Roberts complained that BNSF had recently been able to operate only five northbound trains over the Canyon Sub Mr Barkley's reference to a return to normalcy related to operations over the Canyon Subdivision, not the Cal-P Line (Barkley VS, pp 6 and 7 )

The "misunderstanding" mentioned by Mr Barkley related not to BNSF's Cal-P Line trackage rights, but rather to BNSF's trackage rights between Stockton and Bakersfield, specifically, the number of trains BNSF is allowed to operate over that segment. It arose because under the applicable agreement BNSF is permitted to operate six trains daily under normal circumstances, and up to eight trains daily at the discretion of UP's dispatchers However, BNSF had requested permission to operate more than eight trains daily and confusion existed concerning whether certain of the excess trains were permitted detour trains or whether they were trackage rights trains subject to the daily numerical restrictions (Barkley VS, p 7 )

BNSF also refers to an April 27, 2005 internal UP email authored by Jack Argyle, UP's Director Train Management at HDC, stating that BNSF has the right to run intermodal trains between OIG and Stockton on UP lines as trackage rights trains and that UP was "required to run these trains " (UPR-07-0001647 ) However, that statement by Mr Argyle was incorrect and represented his misunderstanding of the application of the Stockton-Bakersfield trackage rights and their interface with the Cal-P Line rights (Argyle VS, pp 1 and 2 ) Similarly, the August 23, 2005 email of UP's Denny Beggs (at the time UP's Director Network Control, but since retired) cited by BNSF (UPR-07-0001650) relates to the number of BNSF trackage rights trains

permitted to operate between Stockton and Bakersfield, not operations over the Cal-P Line (Barkley VS, pp 7 and 8 )

BNSF notes a UP-internal email from Linda Gardner, UP Manager Network Operations, in response to the Beggs' email which references her confirmation, through a conversation with BNSF's intermodal team, of BNSF's operation of intermodal trains from Mojave to OIG (UPR-07-0001650 ) However, that email is proof only that Ms Gardner's reliance on BNSF for advice on the subject was misplaced It is not proof of the accuracy of the self-serving advice itself Had Ms Gardner checked with the appropriate UP officials, she would certainly have been informed that BNSF had no such operating rights

Finally, BNSF cites an August 28, 2006 email from Greg Garrison, UP's General Superintendent HDC West, to BNSF's Dan Munson as confirmation of Mr Garrison's understanding that BNSF "can run one manifest train each way between Oakland and Stockton and unlimited Intermodal " (UPR-07-0001669 ) But Mr Garrison's reference to "Stockton" in this context was incorrect since he meant and should have referred to "Sacramento" instead of Stockton (Barkley VS, p. 8 )<sup>3</sup>

In its undue reliance on this correspondence, BNSF overlooks a fundamental point on which this proceeding is based The authors of these documents did not participate in the negotiations for the Restated and Amended Settlement Agreement and did not and could not know that the version of Section 1(g) it incorporated mistakenly omitted the crucial Central Corridor and I-5 Restrictions They could not

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<sup>3</sup> In Footnote 23 of its Opening Brief BNSF observes that UP did not object to the operation of the non-Central Corridor and non-I-5 Intermodal Trains in the Joint Service Committee meetings held between it and BNSF in 2004 and 2005 However, the most recent Joint Service Committee meeting between UP and BNSF was held on November 11 2005, before the operation of those trains had come to the focused attention of the UP officials with knowledge of the nature and extent of BNSF's operating rights, including the Restrictions

therefore ratify that mistake or bind UP to defective Section 1(g). They simply relied on either the unambiguous, but incorrect, provision or on BNSF's self-serving claims of its rights. Accordingly, the statements quoted by BNSF from that correspondence constitute neither UP's ratification of existing Section 1(g) nor an admission by UP of its correctness. Further, they are either taken out of context, refer to other, unrelated trackage rights operations, or represent mistakes by UP employees not in a position to know of and respond correctly to BNSF's train operations in violation of the Central Corridor and I-5 Restrictions. They do not represent an admission of anything except the complex nature of the trackage rights.

UP itself recognized the complexity of applicable trackage rights arrangements and operations. A UP-internal email from UP's Joe Bearden (UPR-07-0008286), General Manager – Trackage Rights in Fort Worth, notes and expresses frustration over the complexity of the I-5 Corridor trackage rights.<sup>4</sup> Mr. Barkley also expressed frustration over UP's ability to monitor BNSF's compliance with its trackage rights agreements. In a UP-internal email reacting to a notice by Mr. Rebensdorf on BNSF's operation of the unauthorized non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P Line, Mr. Barkley asked "how does this happen??/ do we have checks and balances to monitor and verify BNSF compliance with our agreements???" (UPR-07-0008276).

The misstatements made in the emails and correspondence cited by BNSF, and the confusion they reflect, are not surprising. The language of revised Section 1(g) is

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<sup>4</sup> Mr. Bearden's email reads in part: "but I find this I-5 corridor trackage rights operation very complex. I'm sure there are many different agreements, with restrictions and details for each route. Since the Stockton/Sacramento area has various lines connecting, I'm wondering if there is any 'decoder ring' document that illustrates what can be done where, who can use what, when, etc."

not ambiguous. It does, however, incorrectly omit the Central Corridor and the I-5 Restrictions. The UP employees who authored that correspondence were, understandably, unfamiliar with the Section's background and its intended Restrictions. Accordingly, they applied its language as it plainly, but mistakenly, reads. In doing so, they inadvertently perpetuated the original mistake. But in doing so they did not, at least not knowingly, ratify that mistake. However, once the operation of these unauthorized trains came to the attention of the UP officers with that knowledge, they confronted BNSF and sought the cessation of the operation of the non-Central Corridor and non-I-5 Intermodal Trains. (See UPR- 07-0008125 )

As noted above, in a December 6, 2004 email BNSF's John K. McCreery requested of UP's Myrle Giersch that UP grant BNSF "Temporary Trackage Rights" from Bakersfield to Stege (Richmond) during the period January 23, 2005, through February 5, 2005, for sixteen trains per day (eight trains in each direction) to facilitate maintenance-of-way repair activities on its own lines.<sup>5</sup> (UPR-07-0008774 through UPR-07-0008778 ) Among those copied on this email request was BNSF's Bruce Barrett. UP duly considered BNSF's request, but rejected it in a January 4, 2005 email from Mr. Giersch to Mr. McCreery. (UPR-07-0008775 ) BNSF's trackage rights operation over UP to Stege would, of course, have required it to operate over the Cal-P Line. Had BNSF believed it already had the right to operate such trackage rights trains over the Cal-P Line, it need not have made the request. The fact that BNSF made the request is strong evidence of its understanding at that time that it did not have that right.

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<sup>5</sup> Mr. McCreery's email refers to the time period of the requested temporary trackage rights as from "1/23/04 through 2/05/04." However, considering the December 6, 2004, date of his email, this reference must have been made in error.

Alternatively, and at a minimum, it reflects BNSF confusion concerning the complexity of the various trackage rights arrangements and operations similar to that of certain UP employees as shown above

6      An Unfounded Allegation of Motivation    Based on one internal UP email (UPR-07-0008183), BNSF incorrectly attributes UP's position on the continued existence of the Restrictions to "commercial motivations" related to the increased number of commuter trains operating over the Cal-P Line. In this October 2, 2006 email Mr. David Rector, UP's Director of Transportation Research, indicated to Myrle Giersch, a UP Director Joint Facilities, that UP's Tom Jacoby "would like to force the BNSF off the Martinez Sub, particularly if there should be any vehicle for doing so within the terms of the agreement." Though the term "force" may be misconstrued to imply more than the author intended, it is irrefutable that the memo acknowledges that any action must be taken "within the terms of the agreement." This email evidences only the growing awareness of and concern over BNSF's unauthorized operations over the Cal-P and Elvas-Stockton Lines by those UP officials with knowledge of the Central Corridor and I-5 Restrictions.

7      A Disturbing Pattern of BNSF Behavior    BNSF mentions at page 9 of its Opening Brief its operation of so-called "bare table" trains (i.e., trains of empty intermodal cars) over the Cal-P Line. However, it neglects in this reference to reveal that only when challenged by UP did BNSF stop operating bare table trains, whose operation is clearly not permitted under the Restated and Amended Settlement Agreement (and the Original Settlement Agreement before it) which allows only loaded trains.



**The operation of bare table trains in clear contravention of the rights given BNSF under the Restated and Amended Settlement Agreement is disturbingly similar to other instances of blatantly unauthorized BNSF train operations over other UP trackage. For instance, BNSF has, with no authority, operated its trains over UP's trackage between MP Junction and Forest Avenue in the Dallas area. Similarly, BNSF has operated trains without authority over UP trackage in Fort Worth, Texas - - specifically around the Barnhardt Wye at W Tower 55 (UP later granted BNSF that operational right in exchange for certain operating considerations from BNSF) (Rebensdorf VS, pp 4 and 5, Barkley VS, p 9)**

**It is not difficult to discern a clear pattern of opportunism here. BNSF has shown itself ready, willing, and inclined to both (a) overstep the bounds of trackage rights granted by UP and (b) seize rights not granted by UP, unless and until its improper conduct is discovered and challenged by UP.**

**Based on that pattern of conduct, it certainly appears that, if BNSF did not agree to the inclusion of the defective Section 1(g) alternative in the mistaken belief shared by UP that it included the Restrictions, it opportunistically accepted a version it knew did not reflect UP's intent to maintain the Restrictions. As noted above, a mistaken party is entitled to reformation relief in a contract mistake case even if the other party did not in fact make a mistake, yet knew the mistaken party had. Regretfully, the unauthorized operation of non-Central Corridor and non-I-5 Corridor Intermodal Trains over the Cal-P and Elvas-Stockton Lines belatedly came to the attention of those UP officials who were familiar with the Restrictions prohibiting the operation of those trains. However, once**

those UP officers became aware of the unauthorized operation, BNSF was notified to stop the unauthorized operations <sup>6</sup>

**B     The Lack of UP Gross Negligence**

BNSF argues that UP is barred by its own "gross negligence" from being eligible to obtain the relief offered by reformation. However, any negligence by UP in proposing the defective Section 1(g) alternative and in reacting to the operation of the unauthorized non-Central Corridor and non-I-5 BNSF Intermodal Trains does not rise to the level of "gross negligence."

"Gross negligence" has long been defined in California and other jurisdictions as either a "want of even scant care" or "an extreme departure from the ordinary standard of conduct." *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4<sup>th</sup> 1175, 1185-1186, 7 Cal. Rptr. 3<sup>rd</sup> 552, 80 P.3<sup>rd</sup> 656 (Eastburn), and cases cited; accord, *Colich & Sons v. Pacific Bell* (1988) 198 Cal. App. 3<sup>rd</sup> 1225, 1240, 244 Cal. Rptr. 714 (Colich), *Kearl v. Board of Medical Quality Assurance* (1986) 189 Cal. App. 3<sup>rd</sup> 1040, 1052-1053, 236 Cal. Rptr. 526, see also, e.g., *Prosser & Keeton, The Law \*\*\* 532 of Torts* (5<sup>th</sup> ed. 1984) Sec. 34, pp. 211-212 (Prosser and Keeton), 57A Am. Jur. 2<sup>d</sup> (2004) Negligence, Sec. 227, p. 296 ) FN4

BNSF notes that at least six drafts of the Restated and Amended Settlement Agreement were exchanged between the parties before the filing of the final version with the Board on March 1, 2002. However, the version of Section 1(g) that mistakenly omitted the Restrictions was agreed upon by the parties very early (May 2001) in the

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<sup>6</sup> Footnote 14 of its Opening Brief expresses BNSF's interest in the October 10, 2006 email from Mr. Rebensdorf to Mr. Bredenberg citing the June 1, 1996 Denver to San Jose trackage rights agreement as the basis for the prohibition in the operation of non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P Line. However, that email is strong evidence of UP's understanding that the Restrictions remained in place.

drafting/negotiation process, and they did not thereafter revisit the Section to consider whether it correctly reflected their intention with respect to the Restrictions. This is merely evidence of an initial mistake, not evidence of multiple mistakes. Similarly, BNSF contends that several UP employees permitted the operation of non-Corridor and non-I-5 BNSF Intermodal Trains over the Cal-P and Elvas-Stockton Lines, notwithstanding UP's position on the intention of the parties to retain the Central Corridor and I-5 Restrictions. Again, those employees' reliance on the unambiguous but incorrect language of Section 1(g) of the Restated and Amended Settlement is not evidence of UP gross negligence.

**C     The Materiality of the Mistake**

BNSF argues that the addition of the unauthorized BNSF Intermodal Trains on the Cal-P line are immaterial to UP's operation and that UP is therefore not entitled to the reformation relief it seeks. That argument is patently incorrect and easily discredited.

The fact that the parties contemplated more BNSF trackage rights trains would operate over the trackage in question (four per day) than currently operate (approximately three per day) does not entitle BNSF to the operation of unauthorized trains, regardless of their number. And, of course, simply because BNSF currently operates fewer trains than the parties originally anticipated does not mean it might not operate in excess of that number in the future. The materiality of the mistake, including its adverse impact on passenger and UP's freight operations, is described in detail in the Verified Statements of Mr. Eugene Skoropowski, the Capitol Corridor's Managing Director, and UP's Tom Jacobi, which were filed in support of the Petition.

**D     Reformation Will Not Harm Third Parties, BNSF Has Not Relied on the Mistake to its Disadvantage**

BNSF has produced no evidence of the "harm" it alleges its shippers would suffer if Section 1(g) is reformed to reimpose the Restrictions and thus require BNSF to operate its non-Central Corridor and non-I-5 Intermodal Trains over its own route between Stockton and OIG. In fact, its line between Stockton and Richmond is its shortest, fastest route to serve OIG, and is the shortest, fastest route of either UP or BNSF between Stockton and Oakland. (Rebensdorf VS, p. 5) BNSF cannot, as it maintains it has at page 39 of its Opening Brief, have relied on trackage rights over UP's Cal-P Line when it negotiated rights to operate into OIG since its line between Oakland and Stockton is neither inefficient nor slow.

BNSF has not demonstrated that it has been prejudiced or harmed by any delay of UP in notifying BNSF of and objecting to the operation of unauthorized BNSF Intermodal Trains over the Cal-P and Elvas-Stockton Lines. BNSF has not relied to its detriment on the mistaken trackage rights operation by foregoing other opportunities or abandoning any facilities. BNSF has switched the operation of Intermodal Trains over to the Cal-P Line to eliminate congestion on its own line between Stockton and Richmond. However, requiring BNSF to return these trains to its own main line (which is the shortest, fastest route to serve OIG) merely restores the status quo ante.

BNSF claims that it relied to its disadvantage on the defective Section 1(g) alternative included in the Restated and Amended Settlement Agreement when it

negotiated for the right to operate into OIG<sup>7</sup> However, OIG opened in August 2001, shortly after UP and BNSF, on July 25, 2001, filed with the STB a draft version of the Restated and Amended Settlement Agreement that contained the defective Section 1(g) alternative OIG's opening also occurred well before either (a) the finalization of the Restated and Amended Settlement Agreement in March 2002 or (b) UP's grant of the 2004 Stockton-Bakersfield trackage rights that BNSF claims was necessary to handle OIG traffic Accordingly, BNSF cannot with justification claim that third parties will be harmed if the mistaken omission of the Central Corridor and I-5 Restrictions is corrected In any event, BNSF operated into OIG, and entered into contracts to handle OIG traffic, well before it could effectively use the Cal-P Line rights in conjunction with the Stockton-Bakersfield rights that UP granted it in 2004 (Rebensdorf VS, p 6 )

In addition, BNSF is mistaken in its belief, as stated in footnote 31 on page 39 of its Opening Brief, that the intent of the competitive elements of the Original Settlement Agreement was "to place BNSF in the shoes of the former SP so that all competition – both existing and future – is preserved " Continuing in this vein, BNSF asserts that since SP could have used the Cal-P and Elvas-Stockton Lines to serve OIG, BNSF should have that right as well

This BNSF argument is without merit The Original Settlement Agreement was intended to allow BNSF, using its own lines as supplemented by necessary trackage rights over UP, to serve "2-to-1" customers or corridors (i e , customers or corridors that before the UP/SP merger were served only by UP and SP and would, unless access

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<sup>7</sup> BNSF has not produced any documents supporting this claim Nor has it produced any documents giving UP notice of its intention to rely on the defective Section 1(g) in serving OIG Obviously, if BNSF had notified UP of its intention UP would have immediately challenged the proposed operation BNSF's assertions here appear, if anything, to indicate that it recognized UP's mistake in proposing the defective Section 1(g) alternative, yet remained silent and bided its time until it could opportunistically exploit the error

were granted to a third party, drop from two railroad to one railroad service after the merger) (Rebensdorf VS, pp 6 and 7 ) Clearly, in a case like Oakland-Stockton, it was never contemplated that BNSF would use the same routes that SP or UP could use, particularly when BNSF had and continues to have the shortest, fastest route between those points Even if BNSF were correct in its argument that it doesn't have capacity on its own route to serve OIG (and UP disputes the accuracy of such argument), BNSF could add capacity to its own shorter, more efficient route It is not the responsibility of UP under the Settlement Agreement to become the slack adjuster for BNSF's refusal to add capacity to its own lines Further, if BNSF were correct in its argument that it can use any SP route that SP would have used to compete with UP pre-merger, BNSF would as a result be entitled to operate its trains over virtually all of SP's pre-merger lines, even when BNSF has its own higher capacity and more efficient route, such as between Los Angeles and Chicago Such a result would be as ludicrous as the argument offers in favor of it

### CONCLUSION


Notwithstanding the length of BNSF's Opening Brief or the number of "arguments" it makes in its support, the issue under consideration in this proceeding is not complex A mistake was made in the drafting of Section 1(g) of the Restated and Amended Settlement Agreement which must be corrected by reformation of that section to return the parties to their relative competitive positions as they existed before the mistake was made This mistake was nothing less than the inadvertent omission of the crucial Central Corridor and I-5 Restrictions from the version of Section 1(g) included in

the Restated and Amended Settlement Agreement that BNSF and UP jointly submitted to the Board on March 1, 2002

The equitable remedy of reformation is available to reform a contract that, like the Restated and Amended Settlement Agreement, fails through mutual mistake or fraud to express the true agreement or intention of the parties. It is irrelevant whether the elimination of the Restrictions resulted from a mutual mistake or, instead, whether BNSF at the time knew or suspected that the eliminated wording was a mistake upon which it now opportunistically seeks to capitalize.

The fact is that Section 1(g) of the Restated and Amended Settlement Agreement does not correctly express either the parties' intent with respect to BNSF's operating rights over the Cal-P and the Elvas - Stockton Lines or the Board's mandate to maintain the competitive status quo between the two carriers. For these reasons, its mistaken omission should be corrected by reformation.

Respectfully submitted,

  
\_\_\_\_\_  
J. Michael Hemmer  
Lawrence E. Wzorek  
William G. Barr  
Jeffrey S. Asay  
Union Pacific Railroad Company  
1400 Douglas Street  
Omaha, Nebraska 68179  
Tel (402) 544-5000

*Attorneys for Union Pacific  
Railroad Company*

October 4, 2007

**CERTIFICATE OF SERVICE**

I, William G Barr, hereby certify that on this 4<sup>th</sup> day of October, 2007, I served  
a copy of the foregoing Reply Brief of Union Pacific Railroad Company by email and  
UPS Overnight mail on the following

Adrian L Steel, Jr  
Evan P Schultz  
Mayer, Brown, Rowe & Maw LLP  
1909 K Street, NW  
Washington, D C 2006

and by first-class mail, postage prepaid, on the following

William A Mullins  
Robert A Wimbush  
Baker and Mullins PLLC  
Suite 300  
2401 Pennsylvania Ave , N W  
Washington, D C 20037

Christopher A Mills, Esq  
Slover & Loftus  
Attorneys at Law  
1224 Seventeenth Street, N W  
Washington, D C 20036-3003

  
\_\_\_\_\_  
William G Barr



**PUBLIC VERSION**

**VERIFIED STATEMENT  
OF  
STEPHEN R. BARKLEY**

**My name is Stephen R. Barkley. I am Vice President, Harriman Dispatching Center and Network Operations, for Union Pacific Railroad Company ("UP"). My office is located at 850 Jones Street, Omaha, Nebraska 68102. I am responsible for and oversee the operation of UP's Harriman Dispatching Center ("HDC"). I am submitting this statement in support of the UP Reply Brief to which it is attached.**

**I have held my current position since July 1, 2004. I joined UP from Illinois Central Railroad in 1980. From 1980 to 1989, I held various positions in the UP Operating Department, including several trainmaster positions, Director of Train Management and Manager of Train Operations. In 1989 and 1990, I worked in UP's Marketing and Sales Department, initially as Director of the National Customer Service Center and subsequently as General Director of Service Design. I then returned to the Operating Department, serving as Division Superintendent in Stockton, California and Houston, Texas. From 1994 to 1996, I served as General Manager of the Southern Region. In 1996 and 1997, I was Assistant Vice President in charge of the Harriman Dispatch Center in Omaha. From 1997 until 2004, I was Regional Vice President, Southern Region for UP located in Houston, Texas.**

**I have reviewed BNSF's Opening Brief in this proceeding. Among other things, BNSF in its Opening Brief argues that UP's course of performance under the Restated and Amended Settlement Agreement is evidence that the parties did not intend to retain**

the Central Corridor and I-5 Restrictions [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

BNSF maintains that it gave UP prior notification of its intended operation of non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P Line. Specifically, BNSF contends that (1) it provided UP with an "operating plan" for those trains, (2) its trackage rights officials in Omaha regularly "spoke" with their counterparts at UP's HDC about the trains' operation, (3) all of these trains were "electronically entered" (in a format identifying type, origin, and destination) in UP's computer system, and (4) certain correspondence between BNSF and UP gave UP notice of the trains' operation and is evidence of their acceptance by UP. However, BNSF is incorrect in each of these contentions.

I have thoroughly investigated BNSF's claim that it gave UP an "operating plan" for the operation of non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P Line. I have found no evidence that any such "operating plan" was provided to UP.

BNSF's Opening Brief refers at pages 11 and 29 to a "notice" given by Bruce Barrett, its Manager, Trackage Rights Operations, to UP's corridor managers, directors, and dispatchers advising them of BNSF's intent to operate OIG trains to and from Stockton over the Cal-P and Elvas-Stockton Lines [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

BNSF cites notice purportedly given by it to UP's Corridor Managers of its operation of non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P Line. However, UP's Corridor Managers do not know the extent of BNSF's trackage rights over UP and any limitations or restrictions on those rights. It is not realistic to expect UP's dispatchers to be familiar either with the extent and nature of BNSF's rights or the origin and destination of BNSF's trains that would be necessary to recognize operations not permitted by the Restrictions.

UP granted BNSF trackage rights over more than 4,500 miles of UP track in the Original Settlement Agreement. These grants were subsequently implemented by eleven individually tailored trackage rights agreements. BNSF operates also over approximately 3,000 additional miles of UP trackage under other trackage rights agreements. Each of these trackage rights agreements, whether or not related to the UP/SP merger, contains specific, and often complex, provisions, including any applicable limitations and restrictions. Further, as is common in the railroad industry,

BNSF is also permitted to temporarily operate over certain UP trackage under detour arrangements. UP's Corridor Managers cannot be expected to be familiar with all of these agreements and their corresponding rights and restrictions.

Finally, UP's Corridor Managers are unfamiliar with BNSF's train symbols and cannot tell from them a train's origin and destination and whether it is permitted to operate as proposed by BNSF under the applicable agreement. Instead, they rely on the electronic interface described below to determine if a train's operation is permitted.

BNSF notes that some 1,000 non-Central Corridor/non-I-5 Intermodal Trains have operated over the Cal-P Line since 2004. It argues that the operation of those trains, including UP's billing BNSF trackage rights fees for their operation, is evidence of their "acceptance" by UP. However, since those trains were authorized for operation over the Cal-P Line by electronic programs established for other purposes as described below, the operation of the non-Central Corridor and non-I-5 Intermodal Trains in UP's computer system is not evidence that UP received notice of and accepted them.

BNSF's Opening Brief at page 27 describes the programming of the "Master DB5," or so-called "dummy," for non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P and Elvas-Stockton Lines. BNSF incorrectly assumes that such "dummies" were prepared only for the "regular" operation of Intermodal Trains. However, "dummies" are often prepared for unusual operations like detour train operations. Doing so permits such operations on short notice and promotes operating convenience and efficiency.

UP did, in fact, prepare Master DB5s/"dummies" for the operation of non-Central Corridor and non-I-5 Intermodal Trains over the Cal-P and Elvas-Stockton Lines.

However, the preparation of those "dummies" is not evidence of UP acceptance of any BNSF right to operate such trains in contravention of the Restrictions. The preparation and use of the "dummies" also does not constitute evidence that UP knew of and accepted the operation of non-Central Corridor and non-I-5 BNSF Intermodal Trains over the Cal-P Line since 2004, since either the "dummy" was prepared and established for a permissible temporary operation like the movement of detour trains or the UP employee who programmed the Master DB5 was unaware of the Restrictions for the reasons described above.

No individual review of the operation of trains is undertaken subsequent to the Master DB5 electronic interface programming of the routing permitting the operation of those trains. Once a route is programmed through the establishment of a "dummy," all trains with program-permitted origins and destinations, whether or not they are in fact detour trains, are permitted by the program to operate. The actual operations and the nature of the trains actually operating are not reexamined. The proffered trains are automatically either accepted or rejected for operation. With the DB5/"dummy" already in place, the non-Central Corridor and non-I-5 Intermodal Trains offered by BNSF for movement were automatically accepted for movement.

The operation of the non-Central Corridor and non-I-5 Intermodal Trains was not questioned by the electronic interface once it was established either to accommodate legitimate temporary operations like detour trains or through inadvertent error. Accordingly, though UP's computer system may have understood the information it received on those Intermodal Trains operating contrary to the Restrictions, its failure to



[illegible]

[REDACTED]

Finally, BNSF cites an August 28, 2006 email from Greg Garrison, UP's General Superintendent HDC West, to BNSF's Dan Munson as confirmation of Mr Garrison's understanding that BNSF "can run one manifest train each way between Oakland and Stockton and unlimited Intermodal " But Mr Garrison's reference to "Stockton" in this context was incorrect and he should have referred to "Sacramento" instead of Stockton

The emails and correspondence on which BNSF relies in asserting that UP knew of and consented to the operation of non-Central Corridor and non-I-5 Corridor intermodal trains over the Cal-P Lines are proof of no such thing They are either taken out of context, refer to other, unrelated trackage rights operations, or represent mistakes by UP employees not in a position to know of and respond correctly to BNSF's train operations in violation of the Central Corridor and I-5 Restrictions. They attest to nothing except the complex nature of the trackage rights

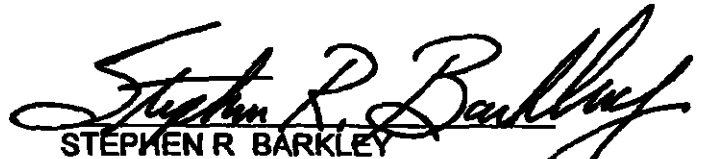


Finally, BNSF mentions at page 9 of its Opening Brief its operation of so-called "bare table" trains (i.e., trains of empty intermodal cars) over the Cal-P Line. The Verified Statement of UP's John Rebensdorf also attached to UP's Reply Brief discusses UP's discovery of BNSF's operation of these bare table trains, the protest UP made to BNSF over their operation, and BNSF's agreement to cease operating them. I have also read Mr. Rebensdorf's description of other examples of BNSF's non-compliance with applicable trackage rights restrictions/limitations (Rebensdorf VS, pp 4 and 5). I completely agree with Mr. Rebensdorf's opinion that these actions by BNSF are indicative of a disturbing tendency of BNSF to overstep the bounds of rights granted to it by UP unless and until its over-aggressiveness is discovered and challenged by UP.

VERIFICATION

STATE OF NEBRASKA   )  
                                  )  
COUNTY OF DOUGLAS   )

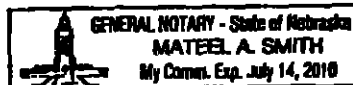
I, STEPHEN R BARKLEY, being duly sworn, state that I have read the foregoing statement, that I know its contents, and that those contents are true as stated

  
STEPHEN R BARKLEY

SUBSCRIBED AND SWORN TO before me this 2<sup>nd</sup> day of October, 2007

  
NOTARY PUBLIC

My Commission expires 7/14/2010



**PUBLIC VERSION**

**VERIFIED STATEMENT  
OF  
JOHN H. REBENS DORF**

My name is John H. Rebensdorf. I am Vice President-Network Planning and Operations for Union Pacific Railroad Company ("UP"). My previous Verified Statement in this proceeding attached to UP's Petition provides information on my educational background and positions I have held at UP. I was UP's primary business representative in its negotiations with BNSF that resulted in (1) the September 25, 1995, Agreement (the "Original Settlement Agreement") addressing competitive issues allegedly raised by the proposed merger of UP and SP, (2) the Restated and Amended Settlement Agreement, and (3) a March 3, 2004, Memorandum of Understanding ("MOU") (and subsequent implementing trackage rights agreement) providing, among other things, BNSF with trackage rights between Bakersfield, CA, and Stockton, CA. I am submitting this statement in support of UP's Reply Brief.

I have reviewed BNSF's Opening Brief in this proceeding. In it, BNSF contends that UP's course of performance under the Restated and Amended Settlement Agreement suggests that BNSF and UP did not intend to retain the Central Corridor and I-5 Restrictions which were included in the Original Settlement Agreement. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Approximately 4,500 miles of these trackage rights were granted by UP in the Original Settlement Agreement and were implemented in eleven individual trackage rights agreements. The other 3,000 miles of trackage rights were also granted through a number of separate and distinct agreements. Many of the agreements granting these trackage rights, whether or not they implement the Original Settlement Agreement, are unique. Many of them contain specific limitations and restrictions that apply only to the trackage rights they grant.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The language of Section 1(g) as it appears in the Restated and Amended Settlement Agreement is not ambiguous. It does, however, incorrectly omit the Central Corridor and the I-5 Restrictions. Anyone unfamiliar with the Section's background and its intended Restrictions would, and did, apply its language as it plainly, but mistakenly, reads. In doing so they would, and did, inadvertently perpetuate the original mistaken omission of the Restrictions. However, in doing so they did not, at least not knowingly, ratify that mistake.

[REDACTED]

[REDACTED]

[REDACTED] Conversely, I am familiar with such limitations and restrictions, particularly those as important as the Central Corridor and I-5 Restrictions. As UP's primary business representative in our negotiations with BNSF over the Restated and Amended Settlement Agreement, I was quite familiar with the parties' intent to retain the Restrictions in the Restated and Amended Settlement Agreement. [REDACTED]  
[REDACTED]  
[REDACTED]

In its arguments, BNSF relies heavily on the Verified Statement of Mr. Peter J. Rickershauser which is attached to BNSF's Opening Brief. For instance, at page 5 of its Opening Brief BNSF states that Mr. Rickershauser's Verified Statement describes how, in BNSF's view, "Original Section 1(g) contained language concerning the extent to which trains using the Cal-P Line and the former SP Elvas-Stockton line had to have a prior or subsequent movement over the Central Corridor or the I-5 Corridor." However, that statement is patently incorrect because BNSF did not receive the right to operate over UP's Elvas-Stockton Line in the Original Settlement Agreement of 1995. In fact, BNSF received operating rights over the Elvas-Stockton Line in 1996, only when it was determined that a connection could not be built by BNSF at Haggin (Sacramento), to connect the rights BNSF received on UP's Martinez and Sacramento Subdivisions to connect Denver with Stockton through the Central Corridor via Donner Pass. UP then granted BNSF rights on its Fresno Subdivision between Elvas and Stockton, but only for Central Corridor trains with a prior or subsequent movement over Donner Pass.

Mr. Rickershauser also refers to the MOU between it and UP (and a subsequent trackage rights agreement implementing the MOU) providing, among other things, BNSF with trackage rights between Bakersfield and Stockton. He states that BNSF negotiated the MOU with the understanding that BNSF had the right to use the Cal-P Line into Oakland for intermodal trains. However, Mr. Rickershauser did not participate in the negotiations with UP for the MOU. The MOU negotiations between BNSF and UP were conducted for the parties exclusively by me, on UP's behalf, and by Mr. Rollin D. Bredenberg, BNSF's Vice President – Service Design and Performance. At no time during those negotiations did Mr. Bredenberg state, or even imply, that BNSF sought the rights between Bakersfield and Stockton for use in the operation of trains that would also move over the Cal-P Line. In fact, our negotiations focused on I-5 Corridor trains operating down to Stockton from Keddle over trackage rights UP granted BNSF in the UP/SP merger. I can state with complete confidence and authority that UP would have never granted BNSF operating rights between Stockton and Bakersfield if BNSF had indicated it intended to use those rights to access the Oakland Intermodal Gateway ("OIG") via the Cal-P Line.

BNSF mentions at page 9 of its Opening Brief its operation of so-called "bare table" trains (i.e., trains of empty intermodal cars) over the Cal-P Line. However, it neglects in this reference to reveal that only when challenged by UP did BNSF stop operating bare table trains, whose operation is clearly not permitted under the Restated and Amended Settlement Agreement (nor under the Original Settlement Agreement before it) which allows only loaded trains.

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**BNSF's operation of bare table trains notwithstanding the Restated and Amended Settlement Agreement's requirement that trackage rights trains be loaded is but one of several instances of unauthorized BNSF train operations over UP trackage. As examples, BNSF has without authority operated its trains over UP trackage (1) between MP Junction and Forest Avenue in the Dallas area and (2) in Fort Worth, Texas, around the Barnhardt Wye at Tower 55 (UP later granted BNSF that operational right in exchange for certain operating considerations from BNSF)**

**In what has become an all too familiar pattern, BNSF has shown that it is not reluctant, and actually appears more than willing, to overstep the bounds of rights granted by UP unless and until its over-aggressiveness is discovered and challenged by UP. Regrettably, the unauthorized operation of non-Central Corridor and non-I-5 Corridor Intermodal Trains over the Cal-P and Elvas-Stockton Lines belatedly came to my attention [REDACTED]**

**[REDACTED]**

**In its Opening Brief BNSF alleges, without any showing of evidence, that certain of its shippers would suffer "harm" if Section 1(g) is reformed to reimpose the Restrictions and thereby require BNSF to operate its non-Central Corridor and non-I-5 Intermodal Trains over its own route between Stockton and OIG. In reality, as shown in attached Exhibit I, BNSF's Stockton and Richmond line is its shortest, fastest route to serve OIG, and is the shortest, fastest route of either UP or BNSF between Stockton and Oakland. Contrary to the contention made in its Opening Brief, BNSF could not have relied on trackage rights over UP's Cal-P line when it negotiated rights to operate into OIG since its line between Oakland and Stockton is neither inefficient nor slow**

BNSF also claims that it relied to its disadvantage on the defective Section 1(g) alternative included in the Restated and Amended Settlement Agreement when it negotiated for the right to operate into OIG. However, OIG opened in August 2001, shortly after UP and BNSF on July 25, 2001, jointly filed with the STB a draft version of the Restated and Amended Settlement Agreement that contained the defective Section 1(g) alternative. Also, OIG opened well before either (1) the finalization of the Restated and Amended Settlement Agreement in March 2002 or (2) UP's grant of the 2004 Stockton-Bakersfield trackage rights that BNSF claims was necessary to handle OIG traffic. Accordingly, BNSF cannot rightly claim that third parties will be harmed if the mistaken omission of the Central Corridor and I-5 Restrictions is corrected. BNSF operated into OIG, and entered into contracts to handle OIG traffic, well before it could effectively use the Cal-P Line rights in conjunction with the Stockton-Bakersfield rights that UP granted it in 2004.

In addition, BNSF is mistaken in its belief, as stated in footnote 31 on page 39 of its Opening Brief, that the Original Settlement Agreement was intended "to place BNSF in the shoes of the former SP so that all competition – both existing and future – is preserved." BNSF also incorrectly asserts that, since SP could have used the Cal-P and Elvas-Stockton Lines to serve OIG, BNSF should have that right as well.

These arguments by BNSF are totally without merit. The Original Settlement Agreement was intended to allow BNSF, using its own lines as supplemented by necessary trackage rights over UP, to serve customers or corridors that before the UP/SP merger were served only by UP and SP (so-called "2-to-1" customers or corridors) that would, unless access were granted to a third railroad, drop from two



railroad to one railroad service after the merger. Clearly, in a case like Oakland-Stockton, it was never contemplated that BNSF would use the same routes that SP or UP could use, particularly since BNSF has the shortest, fastest route between those points. BNSF argues that it doesn't have the capacity on its own route to serve OIG. However, BNSF is not prevented or excused from adding capacity to its own shorter, more efficient route. Under no agreement or for any other reason should UP be held responsible to remedy BNSF's failure to add capacity to its own lines. Furthermore, if, as BNSF argues, it should be allowed to use any SP route that SP would have used to compete with UP pre-merger, BNSF would thereby be entitled to operate its trains over nearly all of SP's pre-merger lines, even where BNSF has its own higher capacity and more efficient route (e.g., BNSF's route between Los Angeles and Chicago). Such a result certainly was not contemplated by UP when it negotiated the Original Settlement Agreement, nor could such a result have been contemplated by the STB in its approval of the UP/SP merger.

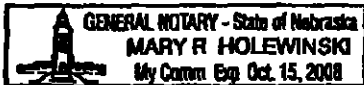
VERIFICATION

STATE OF NEBRASKA   )  
                                  )  
COUNTY OF DOUGLAS   )

I JOHN H REBENDORF, being duly sworn, state that I have read the foregoing statement, that I know its contents, and that those contents are true as stated

  
JOHN H. REBENDORF

SUBSCRIBED AND SWORN TO before me this 2nd day of October, 2007



  
NOTARY PUBLIC

My Commission expires October 15, 2008

# Comparison of Oakland to Stockton Routes

Route	Origin Point	Termination Point	Miles	Rise and Fall (Ft.)	Curvature (Degrees of Central Angle)	Minimum TPS Run Time
UP Martinez Sub	Oakland	Stockton	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
BNSF Franklin Sub	Oakland	Stockton	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
UP Altamont Pass	Oakland	Stockton	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Assumes [REDACTED]  
Based on Train Performance Simulation (TPS)

**VERIFIED STATEMENT  
OF  
JACK R. ARGYLE**

My name is Jack R Argyle I am Director Train Management for Union Pacific Railroad Company ("UP") at its Harman Dispatching Center ("HDC") My office is located at 850 Jones Street, Omaha, Nebraska 68102 I am responsible for and oversee daily train operations on UP's Western Region North territory, which includes portions of UP's Utah and Roseville Service Units I am submitting this statement in support of the UP Reply Brief to which it is attached

I have held my current position since May 1, 1998 I joined UP from a private accounting firm in June 1974 From 1974 to the present, I have held various positions at UP, including Yardmaster, Terminal Trainmaster, Manager Yard Operations, Manager Train Operations, Corridor Manager, Manager Data Integrity, and Director Train Management

I have reviewed BNSF's Opening Brief in this proceeding [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

I believe that my misunderstanding arose due to the complexity of BNSF's trackage rights over UP in Northern California. At the time I made the statement, numerous trackage rights agreements, both permanent and temporary (e.g., for weather-related reasons, to accommodate engineering projects on BNSF lines), gave BNSF various rights over many of UP's major routes in Northern California. Many of the temporary agreements were extended as necessary. Applying the provisions of the various agreements to the appropriate routes was very confusing. It is very difficult to be familiar with the varying provisions of the numerous agreements by which UP granted BNSF more than 4,500 miles of trackage rights in the UP/SP merger proceeding. This is particularly true where, as in Northern California, those UP/SP merger trackage rights are in close proximity to non-UP/SP merger trackage rights.

VERIFICATION

STATE OF NEBRASKA   )  
                                  )  
COUNTY OF DOUGLAS   )

I, JACK R ARGYLE, being duly sworn, state that I have read the foregoing statement, that I know its contents, and that those contents are true as stated

  
JACK R ARGYLE

SUBSCRIBED AND SWORN TO before me this 2nd day of October, 2007

  
NOTARY PUBLIC

My Commission expires 7/14/2010



## **EXHIBIT A**

**Principal Amendments to BNSF Settlement Agreement<sup>1</sup>**

<b><u>Section(s)</u></b>	<b><u>Change</u></b>
Definitions	Adds definition of "Shipper Facilities"
Definitions	Adds definition of "'2-to-1' Points"*
Definitions	Adds definition of "'2-to-1' Shipper Facilities"
Definitions	Adds definition of "New Shipper Facilities"
Definitions	Adds definition of "Trackage Rights Line"
Definitions	Clarifies when New Shipper Facilities are "on" a Trackage Rights Line
Definitions	Adds definition of "Existing Transload Facilities"***
Definitions	Adds definition of "New Transload Facilities"*
1(a)	Adds Overhead Trackage Rights between Binney Jct and Roseville, CA for directional operations
1(a)	Designates BNSF trackage rights between Elvas (Elvas Interchange) and Stockton, CA as Overhead Trackage Rights*
1(c), 3(d), 4(c), 5(c) and 6(c)	Clarifies BNSF's access at '2-to-1' Points and on Trackage Rights Lines
1(d), 3(h), 4(d), 5(d) and 6(f)	Conforms language to corresponding preceding sections
1(e)	Provides certain rights to BNSF in the event UP vacates its Sparks, NV intermodal facility
1(g)	Restates traffic restrictions on "Cal-P" and Donner Pass lines

<sup>1</sup> The amendments identified in this chart are in addition to those made by the First and Second Supplements to the original September 25, 1995 BNSF Settlement Agreement

\* BNSF and UP offer alternative proposals with respect to this issue

\*\* UP does not agree that this new definition is required



<b><u>Section(s)</u></b>	<b><u>Change</u></b>
4(a)	Adds BNSF trackage rights to CPSB Elmendorf plant
4(a)	Adds BNSF trackage rights between Round Rock and McNeil, TX for interchange with CMTA operator
4(b)	Changes CMTA operator interchange from Elgin to McNeil
4(b)	Provides for sale of yards in Brownsville and San Antonio, TX
5(a)	Includes reference to Term Sheet Agreement
5(a)	Adds trackage rights to Port Arthur, TX and Harbor, LA
5(b)	Removes CMA Agreement restrictions on BNSF access to Lake Charles area shippers
5(g)	Deletes provision concerning sale of SP's line between Iowa Junction and Avondale to BNSF
6(c)	Adds language to implement Entergy build-in/build-out condition
6(d)	Adds and deletes language to implement (i) BNSF right to interchange Lake Charles area traffic with KCS at Shreveport and Texarkana and (ii) TUE access condition
7(e)	Adds BNSF Overhead Trackage Rights between Pacific and Labadie, MO
8(i)	Clarifies that the parties' intention is to preserve competition for "2-to-1" customers and all other shippers who had direct competition or competition by means of siting, transload or build-in/build-out pre-merger
8(i)	Clarifies that BNSF has access to "2-to-1" Shipper Facilities, Existing Transload Facilities and New Shipper Facilities at omnibus points
8(k)	Adds BNSF right to interchange with certain short-lines establishing a new post-merger interchange on a Trackage Rights Line
8(l)	Adds expanded CMA Agreement build-in/build-out condition

<b>Section(s)</b>	<b>Change</b>
8(o)	Adds language to provide that if UP determines not to renew a BNSF-served transload facility's lease, UP is required to renew the lease for the remaining term of the contract (up to 24 months) between BNSF and the facility
8(p)	Adds BNSF language to provide BNSF with right to purchase or lease unused team tracks at "2-to-1" points***
9(d)	Adds language incorporating dispatching protocols
9(d)	Adds Houston "clear route" language
9(d)	Adds language providing for owner notification to tenant if a Joint Trackage line and/or associated facility is to be sold or retired and providing that the sale be made subject to the Settlement Agreement
9(g)	Clarifies that all referenced locations include areas within switching limits designated by tariff in effect on 9/25/95
9(h)	Adds language specifically providing that tenant carrier has the right to build yards and other facilities to support its trackage rights operations
9(j)	Adds BNSF equal access to SP Gulf Coast SIT facilities
9(n)	Adds provision on directional operations

\*\*\* UP does not agree that the new language is needed.

## **EXHIBIT B**

**HIGHLY CONFIDENTIAL**